

The Administrative Law Judge (ALJ) determined that claimant's preinjury average weekly wage (AWW) was \$453.77. The ALJ found claimant suffered a 15 percent functional impairment to the body as a whole based on the rating of Dr. Edward Prostic. The ALJ also found that claimant is entitled to an award based upon a work disability of 34.5 percent which is the average of a wage loss of 29 percent and a task loss of 40 percent.

Respondent argues that claimant failed to sustain his burden of proof concerning the nature and extent of his injuries. Respondent contends that the transcript of Dr. Prostic's deposition taken on May 19, 2006, should not have been allowed into evidence because the deposition was taken outside claimant's submission date of April 20, 2006, and no motion to extend time was filed by claimant before the expiration of his terminal date. Respondent also argues that the rating of Dr. Chris Fevurly is more credible than the rating of Dr. Prostic, and, since Dr. Fevurly rated claimant as having an impairment of 10 percent to the claimant's left lower extremity, claimant is not entitled to a work disability. Respondent also notes that the ALJ's Award failed to reflect the Order for Involuntary Assignment of Compensation filed in this case and asserts that any Award in this case should reflect the child support obligations of claimant.

Claimant argues that the ALJ undervalued his preinjury AWW. Claimant asserts that his preinjury AWW should be \$506.10, making the benefit rate \$337.42 per week. Claimant also argues that as a result of the incorrect calculation of his preinjury AWW, his percentage of wage loss is 37 percent, making his work disability 38.5 percent. In regard to the deposition of Dr. Prostic, claimant states that he requested an extension of his terminal date and, following a hearing by telephone conference call with the ALJ, was granted the extension for good cause shown over the objection of respondent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is employed by respondent, an agency that provides workers to other companies. He was injured while working at Matcor, a company that makes frame parts for Caterpillars. Respondent introduced a wage statement, which the ALJ used in determining claimant's preinjury AWW. On the date of his accident, claimant was earning a base wage of \$9 per hour, making his base AWW \$360. Claimant had also earned \$876.60 in overtime wages during the six-week period he worked for respondent before his accident, making his average weekly overtime \$146.10. Accordingly, the Board finds that claimant's preinjury AWW is \$506.10, making his benefit rate \$337.42.

On December 6, 2003, claimant was helping change over a brake when a 2,000 pound breaker box fell, landing on his left foot. He was taken to the hospital, where his foot was x-rayed and he was told he had a "busted up foot."<sup>1</sup> He was sent home wearing a splint. Respondent sent claimant to Dr. Mears, a family practice doctor. Dr. Mears treated claimant's foot until March 2004, when claimant was released to return to light

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<sup>1</sup> R.H. Trans. at 9.

duty.<sup>2</sup> He has been working on light duty ever since. Respondent sent him to a different employer, Sealite, where the work is lighter than at Matcor.

Following a preliminary hearing on September 28, 2004, Special ALJ E.L. Lee Kinch ordered respondent to provide claimant with a list of three orthopedists from which claimant was to choose one to serve as claimant's authorized treating physician. Claimant selected Dr. Lee Humphrey, a podiatrist, from that list. However, claimant said that Dr. Humphrey only looked at his foot and took an x-ray, but provided no treatment.

Claimant still has difficulty walking with his left foot, which causes problems with his ankle, knees, hip, and back. Claimant said he now has to walk sideways on his foot so he doesn't have to bend the front part of his foot. Claimant believes this altered gait has caused his pain in his knees, hip, and back. This altered gait has gotten worse with time. Claimant has trouble with standing more than 15 minutes at a time and has trouble walking. His back pain limits his movement, such as in bending over. He also has difficulty with prolonged sitting. He says he can now lift only about five pounds; he had no trouble lifting before the accident.

Claimant said that at his new job, he makes \$8 per hour and has worked no overtime. Thus, he is earning \$320 per week which, when compared to his preinjury AWW of \$506.16, equals a 37 percent wage loss. Even though his current job is lighter duty, it still presents him with physical difficulties. He has to stand longer than is comfortable for him. He also has to bend over and pick up parts. The combination of bending and lifting bothers his back, and bending over and squatting down to pick up parts puts pressure on his foot, causing him pain. Claimant denies having had any back problems before the injury which is the subject of this claim.

The Regular Hearing was held on March 21, 2006. At that time, terminal dates were set as April 20, 2006, for claimant and May 20, 2006, for respondent. Claimant's counsel informed the court and respondent's counsel at the March 21, 2006, Regular Hearing that he would be taking the deposition of Dr. Prostic.<sup>3</sup> Dr. Prostic's deposition was, in fact, taken on May 19, 2006, pursuant to a Notice to Take Deposition mailed by claimant's counsel on May 7, 2006. No objection was noted at that deposition. However, a Motion to Quash Deposition had been served on May 18, 2006, by respondent.

Following a hearing by telephone conference call on May 18, 2006, the ALJ entered an Order on May 19, 2006, extending claimant's terminal date to June 19, 2006, and respondent's to July 19, 2006. That Order states that it is being entered pursuant to a motion to extend terminal dates filed previously by claimant. The ALJ's Order does not

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<sup>2</sup> Claimant was not paid any temporary total disability compensation and none is being sought.

<sup>3</sup> R.H. Trans. at 13.

mention when that motion was filed, and a review of the pleadings contained within the Division's administrative file does not disclose such a motion. Nevertheless, the hearing was conducted before the expiration of terminal dates and before the record was closed. Based upon the ALJ's Order, the Board finds that Dr. Prostic's deposition should be included in the record. Respondent apparently likewise relied upon the ALJ's Order extending terminal dates, as it did not take the deposition of its expert, Dr. Fevurly, until July 6, 2006.

Dr. Prostic, a board certified orthopedic surgeon, examined claimant on June 9, 2004, at the request of claimant's attorney. After taking a history, reviewing past medical records and x-rays, and examining claimant, Dr. Prostic found that claimant had suffered a crush injury to his left foot during the course of his employment. Claimant had multiple metatarsal fractures, and Dr. Prostic suspected that he had developed a compartment syndrome of his foot. Dr. Prostic opined that the abnormal gait caused by claimant's foot injury caused problems in claimant's left knee and left hip, specifically patellofemoral dysfunction and trochanteric bursitis. He recommended anti-inflammatory medicines, consideration of steroid injections, exercises for the hip and knee, and an ultrasound bone growth stimulator to accelerate the healing of the fractures. He did not consider claimant to be at maximum medical improvement.

Dr. Prostic again examined claimant on April 11, 2005. Claimant complained of pain into his low back, his knee and hip. Dr. Prostic found claimant's sitting, standing, and walking posture to be satisfactory. Claimant walked with a shortened stance and stride length on the left with his left foot externally rotated. He was unable to walk on his left forefoot, but he walked symmetrically on his heels. Claimant was able to squat to only one/half of normal excursion and had low back tenderness at the left sacroiliac joint and at the left greater trochanter. Range of motion of the spine was satisfactory and range of motion of the hip and knee was full and fluid. There was no atrophy of the calf, but there was diffuse tenderness in his mid-foot and forefoot with decreased motion and sensation of all toes. X-rays showed the fractures of the third and fourth metatarsals were healed.

Dr. Prostic concluded that "on or about December 6, 2003, [claimant] sustained crush injury to his left foot during the course of his employment. He had metatarsal fractures with compartment syndrome. From abnormal gait he has developed problems about his knee, hip, and sacroiliac joint."<sup>4</sup> Dr. Prostic admitted that claimant's weight problems contribute to his current complaints. Nevertheless, he considered claimant's condition, including the knee, hip, and back, to be permanent.

Dr. Prostic issued restrictions that claimant should not return to work that required prolonged standing or walking, walking on uneven surfaces, or more than minimal climbing, squatting or kneeling. He expected these restrictions to be permanent.

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<sup>4</sup> Prostic Depo., Ex. 2 at 2.

Dr. Prostic's April 11, 2005, report states that claimant should have the orthotics mentioned by Dr. Humphrey, continue with anti-inflammatory medications, and lose weight. During his deposition testimony, Dr. Prostic added "injections" to his recommended future medical treatment.<sup>5</sup> It was also his opinion, using the *AMA Guides*,<sup>6</sup> that claimant has a 15 percent permanent partial disability to the body as a whole on a functional basis. During cross-examination, Dr. Prostic said that if he were to eliminate claimant's subjective complaints from his consideration, then he would limit his rating of claimant's impairment to 20 percent to the left lower leg because pain and tenderness in the affected areas, in addition to objective findings, are prerequisites to his rating for impairment under the *AMA Guides*.

Dr. Prostic went over a task list prepared by Karen Terrill listing the tasks claimant performed in the 15 years before his accident at respondent. Language in Dr. Prostic's deposition indicates that there were 45 unduplicated tasks on that list, and that Dr. Prostic testified that claimant was unable to perform 18 for a task loss of 40 percent. However, a closer review of Dr. Prostic's testimony and the task list shows there to be 43 unduplicated tasks, and Dr. Prostic found that claimant could no longer perform 16, for a 37 percent task loss.

Dr. Fevurly, who is board certified in internal medicine and preventative medicine, examined claimant on June 29, 2006, at the request of respondent. At that time, claimant complained to Dr. Fevurly that he had constant left foot pain located over the dorsal foot and arch of the foot. He also complained of numbness throughout the foot with a stabbing pain in the tarsal heads with prolonged standing. Claimant had subjective complaints of constant low back pain in the thoracolumbar area, bilateral knee pain described as a stabbing pain, upper back pain, left buttocks pain, and shoulder discomfort.

Dr. Fevurly noted that claimant has a "very awkward limping type gait and he walks with his left foot externally rotated."<sup>7</sup> He found that claimant had generalized tenderness through the upper back area but had good range of motion of the cervical spine to rotation, flexion, extension, and lateral motion. Claimant also had tenderness throughout the thoracolumbar area with no visible or palpable spasm.

Dr. Fevurly stated that the work event of December 6, 2003, resulted in a crush injury to claimant's left foot resulting in second, third, and fourth metatarsal fractures, which have healed adequately but with mild residual deformity of the left foot from the fractures. Dr. Fevurly testified that some of the deformity in claimant's foot is likely congenital.

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<sup>5</sup> *Id.* at 15.

<sup>6</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>7</sup> Fevurly Depo., Ex. 2 at 4.

Claimant also has a deformity in his ankles described as an equines deformity, meaning he walks on the inside of his feet, resulting in a chronic flattening of his feet. The crush injury led to further deformity of the left foot as compared to the right. Claimant denied having any problems with his feet before the crush injury at work. Claimant reported to Dr. Fevurly that he thought that his change in gait from his crush injury caused his back, hip and knee pain. It was Dr. Fevurly's opinion that claimant's low back pain is nonspecific in nature and there is no causal relationship between his current low back pain and the foot injury. In addition, Dr. Fevurly believed that claimant's knee problems are a manifestation of patellofemoral syndrome, which he also did not causally relate to the foot fracture. But Dr. Fevurly also seemed to suggest that claimant's treatment and evaluation may have been inadequate.

Dr. Fevurly agreed that claimant had an altered gait but said claimant has only subjective complaints of low back pain and knee pain. He found no objective evidence of injury to those areas from claimant's altered gait; therefore, he did not accord claimant impairment for his low back or knee pain. Based on the *AMA Guides*, Dr. Fevurly rated claimant as having a 14 percent left foot impairment, which converts to a 10 percent left lower extremity impairment. Relative to claimant's complaints of low back pain and knee pain, Dr. Fevurly opined that these were caused by a combination of his age, his sedentary lifestyle, and his body habitus. He said there was no evidence of injury from the work event of December 6, 2003, to either the low back or the knees.

Dr. Fevurly testified that claimant should avoid activities that might aggravate his foot such as repetitive climbing of ladders or stairs or high impact activities such as running or jumping. He explained that generally, he gives restrictions to prevent further injury, not to prevent symptoms. Although he did not restrict claimant from prolonged standing or walking, he would not be surprised if those caused claimant pain. Dr. Fevurly reviewed the task list prepared by Karen Terrill and testified that he thought claimant could perform all of the tasks on that list, for a 0 percent task loss.

The Board agrees with the ALJ's conclusion that claimant's altered gait is from his foot injury and has led to the symptoms claimant is experiencing in his knee, hip, and back. In this instance, the Board likewise finds the opinions of Dr. Prostic more persuasive than those of Dr. Fevurly. Averaging Dr. Prostic's 37 percent task loss opinion with the actual wage loss of 37 percent, claimant's work disability is 37 percent.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated September 7, 2006, is modified to find that claimant's average weekly wage is \$506.10, making his compensation rate \$337.42, and to find claimant's permanent partial disability to be 37 percent. This award is subject to the

order for involuntary assignment of child support filed with the District Court of Montgomery County, Kansas, on November 7, 2004.

Claimant is entitled to 153.55 weeks of permanent partial disability compensation at the rate of \$337.42 per week or \$51,810.84 for a 37 percent work disability, making a total award of \$51,810.84.

As of December 20, 2006, there would be due and owing to the claimant 153.55 weeks of permanent partial disability compensation at the rate of \$337.42 per week in the sum of \$51,810.84 for a total due and owing of \$51,810.84, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts all other findings, conclusions and orders of the ALJ to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2006.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

The undersigned Board Members respectfully dissent from the majority's opinion. These members would find that the ALJ erred in granting the claimant's belated request for an extension of his terminal dates and would, therefore, exclude the testimony of both

Drs. Prostic and Fevurly.<sup>8</sup> These members would further find that claimant failed to sustain his burden of establishing a permanent impairment or a work disability. As harsh as that result may seem, we believe it is the only justifiable result under these circumstances.

...and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. **An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:**

- (1) If the employee is being paid temporary or permanent total disability compensation;**
- (2) for medical examination of the claimant if the party requesting the extension explains in writing ...; or**
- (3) on application for good cause shown.<sup>9</sup> (Emphasis added.)**

There is no dispute that respondent did not agree to the claimants' requested extension. Thus, any extension must fall within one of the remaining three exceptions. There is no indication that subsections (1) or (2) are implicated in this matter. Thus, we are only left to decide whether there is an application for an extension that sets forth "good cause."

Obviously there are any number of reasons which would constitute "good cause" and justify a party's request to extend terminal dates. However, after scouring the record, there is not one scintilla of evidence to explain why the claimant's lawyer *required* this extension. There is no written motion contained within the Court's record, although respondent acknowledges one was sent to him on May 16, 2006, *after claimant's terminal date expired*. There is no transcript which might shed light on this issue. Equally unfortunate, there is nothing contained within the ALJ's Order that might explain the "good cause" that would justify this extension of time when claimant had 30 days in which to schedule his evidence.

Terminal dates are imposed for a reason. They place both parties on notice of the deadline for their evidence. In this instance, they were incorporated into an Order<sup>10</sup> and that Order clearly states that "[i]f any party fails to meet submission dates, the case shall be decided without the benefit of this evidence." Thus, these dates were not a suggestion

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<sup>8</sup> At oral argument respondent's counsel conceded that if the ALJ was found to have erred in extending the terminal dates, then both physicians' testimony should be stricken from the record.

<sup>9</sup> K.S.A. 2005 Supp. 44-523(b).

<sup>10</sup> ALJ Order dated March 24, 2006.



or a recommendation to be followed but rather, they were an order of the court, intended to facilitate the orderly and timely submission of the evidence.

For whatever reason, claimant's counsel ignored that deadline and only after the date had passed, did he act upon that failure. On May 7, 2006, 17 days after the expiration of his terminal date, claimant sought to schedule his medical evidence. When respondent could not agree to the revised terminal date and the deposition, claimant's counsel apparently sought assistance from the ALJ.

In response, the ALJ apparently conducted a "status conference" and thereafter indicated in his order that an "undocketed" motion to extend terminal dates had been "filed" by claimant and was granted. There is no indication in this order as to the reason given for the extension, nor is there an explanation for its tardy presentation. To make matters worse, there is no transcript from this status conference. Had there been one, it might have gone a long way in explaining the justification for the claimant's motion and the ALJ's decision to grant the motion. As it is, the record is conspicuously silent on this issue.

All we are left with is a belated request by claimant to offer medical evidence. Absent a showing of "good cause," these members believe the ALJ's decision to extend the terminal dates to be error. And the Board has so held in other cases.<sup>11</sup>

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BOARD MEMBER

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BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant  
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>11</sup> *Nunneley v. Laney, Inc.*, No. 1,002,983, 2004 WL 1301712 (Kan. WCAB May 28, 2004); and *Newman v. Carlos O'Kellys*, No. 176,725 1995 WL 715333 (Kan. WCAB Nov. 28, 1995).